IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO. 182 OF 2004

M/s. Sesa Goa Limited, a Company
incorporated under the provisions
of Indian Companies Act, 1956
(Act 1 of 1956), having their Office at
Sesa Ghor, Patto, Panaji, Goa, through
its Director (Resources) Shri M.D. Phal. ..... Petitioner.

V/s.

1. The Mormugao Waterfront Workers
   Union, represented by the General
   Secretary, having its Office at
   Mukund Building, 2nd Floor, P.O.
   Box No.90, Vasco Da-Gama (Goa).

2. M/s. Agencia Ultramarine Private Limited,
   represented by the Managing Director,
   having its Office at Roshan Mahal,
   Swatantrapath, P.O. Box No.42.
   Vasco Da-Gama, (Goa) 403 802.

3. The Central Government Industrial
   Tribunal No.2, 2nd Floor, Shram Raksha
   Bhavan, Shivsrusti Road,
   Opp. Prayadarshani, Sion,
   Mumbai 400 022.

4. Union of India,
   represented by the Central Government
   Standing Council, Mr Vilas Thali,
   Panaji, Goa. 403 0011. ..... Respondents.

Mr. P.K. Rele Sr. Advocate with P.J. Kamat, with Mr. F. Polekar, Advocates for the petitioner.

Mr. B. Lakhakar, Advocate for respondent No. 1.

Mr. G. Sardessai, Advocate for respondent No.2.

CORAM : B.H. MARLAPALLE, J.

Date of reserving the Judgment :
October 16, 2004.

Date of pronouncing the Judgment :
October 29, 2004.

J U D G M E N T :

This petition arises from the Award passed by the leaned Presiding Officer of the Central Government Industrial Tribunal No.2, at Mumbai, in reference No. CGIT-2/51 of 2000 on 29th August, 2003 and though the petition is styled as having been filed under Articles 226 and 227 of the Constitution, it is clear from the prayer clause that it is seeking to quash and set aside the said Award and, therefore, it is required to be treated as a petition filed under Article 227 of the Constitution.

2. The petitioner is a Company incorporated under the Companies Act, 1956 and is engaged in the extraction and export of iron ore, barge building and manufacture of pig iron and coke. It owns the sea going vessel M.V. Orissa, which is registered under the Merchant Shipping Act, 1958. The said vessel was purchased in 1996 with the objectives of utilizing the same for transporting the cargo and also as a transhipper at Mormugao Harbour. M.V. Orissa, came to Goa in March, 1996 and the petitioner Company awarded contract to respondent No.2 Contractor for carrying out loading and unloading

activities on board M.V. Orissa (for short, referred to as the “Vessel”), The contract was for a period of six to eight months in a year, depending upon the requirements and the availability of the cargo. Respondent No.2 is a private limited company, registered under the Companies Act, 1956 and apart from other activities, it is engaged in stevedoring and handling agencies. Whereas, respondent No.1 is a registered trade union, claiming to represent the workmen employed by respondent No.2 and deployed on the Vessel.

3. By work order dated 6.2.1997, the petitioner Company engaged respondent No.2 for looking after the complete transhipping activities of the Vessel on the terms and conditions set out therein. The period of contract was from March, 1996 to December, 1997 and by another work order dated 2.1.1999, the period was fixed from January, 1999 to December, 1999 and it appears that by another Order dated 11.2.1998, the contract period fixed was from 1.1.1998 to 31.12.1998. Some of the terms of this contract order, which are relevant, are reproduced as under :

(a) Scope of activities – providing necessary manpower for carrying out the transhipping activities, including the management of transhipper equipments like cranes, conveyors, loaders and other allied machineries.

(b) Provide the skilled/unskilled manpower for carrying out the operations smoothly as per the details given below :

Crane operators	14.
Electrician	3
Fitters/Belt Attendants.	7
Labourers	24
Shift supervisors	3
Supervisor	1
Clerk	1.

(c) The above skilled/unskilled manpower to be employed on the Vessel to take care of the transhipping operations on round the clock basis shift wise as indicated.

(d) The contractor should handle all the day-today matters of the transhipper staff including their attendance, medical & insurance cover etc.

(e) The contractor should make the payments to the various categories of the persons employed as per the details given .

(f) The contractor should provide 2 pairs of boiler suits/hand gloves, one pair of good quality safety shoes every years and one good quality safety helmet, (duly approved by DGMS) once in two years to all the employees excluding the clerk. The cost of the same will be reimbursed by the Company.

(g) The contractor should insure all the employees excluding the clerk for which the premium should not exceed more than Rs.1,000/- per annum, per employee. The actual amount will be reimbursed to the contractor.

(h) The contractor should maintain the necessary attendance

register of all employees during season/off-season which will be verified by the Company every month.

(i) In respect of each and every labour, directly and indirectly engaged on the vessel in connection with the execution of the contract, the contractor shall be fully responsible to comply with and fulfill the provisions of the Contract Labour Act, Minimum Wages Act, Payment of Wages Act, P.F. Act, Payment of Gratuity Act, ESI and other Legislations and Rules of the State and/or Central Government or other local Authority framed from time to time.

(j) For managing all the above activities, the contractor will be paid fees of Rs.15,000/- per month from June to September and Rs.25,000/- per month from October to May. This contract was valid from March, 1997 to December, 1997.

(j) 100 % payment will be made every month for the expenses incurred for the previous month within 10 days of submitting the bill.

4. The company contends that due to global recession and for allied reasons spelt out in their letter dated 11.6.1999, it had terminated its contract with respondent No.2 and consequently, the contractor had no option but to declare closure of his business operation on board the Vessel with effect from 3.7.1999. In turn, the services of the workmen engaged by respondent No.2 on the Vessel were also terminated by payment of legal dues. However, the

company having decided to place the transhipper in operation again, by its letter dated 27.10.1999, offered limited contract of crane operating jobs to respondent No.2, which in turn, by its letter dated 29.10.1999, called upon the crane operators whose services were terminated as a result of closure operations, to rejoin and confirm their willingness. This offer was followed by a telegram dated 12.11.1999. However, the workmen took a stand that unless all the 24 employees were reemployed after discussions with respondent No.1 Union, they would not be willing to join, but for one Supervisor and three operators. Under these circumstances, respondent No.2, therefore, had no option, but to recall the balance crane operators to fulfill the new contract with the petitioner Company. The workmen, through respondent No.1, raised an industrial dispute before the Assistant Labour Commissioner (Central) at Vasco-da-Gama, and claimed reinstatement with back wages in the operations on the Vessel. It appears that separate disputes were raised by respondent No.1 against the petitioner as well as respondent No.2 contractor. By letter dated 1.6.2000, the Under secretary, Ministry of Labour, Government of India, by referring to the failure report, submitted by the Conciliation Officer on 10.1.2000, informed that the Ministry did not consider the dispute fit for adjudication for the reasons that the workmen involved in the dispute were appointed by the Contractor for specific periods and they were terminated from services on completion of the work. At the same time, by order dated 19.5.2000, the said Under Secretary, referred the following dispute for

adjudication to the Central Government Industrial Tribunal cum Labour Court at Mumbai :

> "Whether the action of the management of M/s. Agencia Ultramarine Pvt. Ltd., Goa, in retrenching the services of 24 workmen (annexure A) with effect from 30.6.99 working in transhipper M.V. Orissa of M/s. Sesa Goa Ltd., is legal and justified? If not, to what relief the workmen are entitled ?"

5. Respondent No.1 Union filed its statement of claim and pleaded that the 24 terminated workers were, in fact, the employees of the petitioner Company and respondent No.2 was only the name sake contractor. They were de facto employees of the petitioner Company and the contract between the Company and respondent No.2 contractor was a sham and bogus arrangement only to avoid legal liabilities in respect of these 24 workmen. In concluding para 7 of the written statement, the union stated thus :

> " The union contends that the work carried on the Vessel "T.V. Orissa" is of a perennial nature and the employment of a Contractor is a mere ploy or a camouflage on the part of the principal employer, that both the alleged Contractor and the Principal Employer are not registered under the relevant provisions of the Contract Labour (Regulation and Abolition) Act, 1971, that there is a deep and pervasive control of the Principal Employer on these workers inasmuch as all the obligations under the said Act and the rules thereunder are undertaken by the Principal Employer and that on the touchstone of the test for whom the workers are working, the answer is yes and that is the Principal Employer M/s Sesa Goa Limited, to mention a few. In these circumstances, it is absolutely imperative that the realities are pierced

> through and the workmen under reference are treated to be in continuous service of the Principal Employer, M/s. Sesa Goa Limited and further to the payment of backwages from the date of their retrenchment till their reinstatement into the service."

On the basis of these contentions and though the demand for reinstatement raised by the Union against the Company was turned down to be referred by Order dated 1.6.2000 on the ground that the workmen were appointed by the Contractor for specific periods and they were terminated from the services on completion of the work, the Industrial Tribunal thought it fit, on considering the statement of claim as well as the written statement filed by the company as well as the Contractor, to frame the following issues.

> (1)Whether the reference is not maintainable as averred in Written Statement ?
>
> (2)Whether, relation as employer and employee exists between Party No.I and No.II ?
>
> (3)Whether the Management closed the business as averred in the written statement and whether such closure is lawful one ?
>
> (4)Whether it is proved that Management retrenched the services of 24 workmen w.e.f. 30.6.1999, working in transhipper "T.V. Orissa" of M/s. Sesa Goa Ltd.? If yes, whether that action of Management is legal and proper ?
>
> (5)If not, what relief if any, workmen are entitled to ?

6. It needs to be noted at this stage that the petitioner was marked as Party No.I and respondent No.2 Contractor Company was marked as Party No.I-A, whereas the present respondent No.1 Union

(referred to as “The Workmen”) was marked as Party No.II in the reference before the Tribunal. Both, the Company as well as the Contractor, raised objections to the framing of issues regarding the existence of employer and employee relationship between the present petitioner Company and the retrenched workmen. After hearing both the parties, the learned Presiding Officer of the Tribunal by his Order dated 3.10.2001, rejected the said objections and, therefore, the reference proceeded further.

7. On behalf of the petitioner company Mr. Satish Thayapurath, who was working as Dy. Manger in the River Fleet Department was examined as a witness, Mr. Sudhil Manerkar, Director of respondent No.2 Contractor was examined as a witness of Party No.I-A and on behalf of the workmen i.e. Party No.II Mr. Francisco Xavier Rodrigues, General Secretary of the present respondent No.1 Union, Mr. Wilson Dias, Fitter and Manoj Salgaonkar, Crane Operator were three witnesses examined. It is pertinent to note that the evidence of two removed workmen i.e. Wilson Dias and Manoj Salgaokar as well as Mr. Staish Thayapurath and Mr. Sudhil Manerkar, would be relevant in deciding the main issue regarding the employer and employee relationship between the petitioner company and the retrenched workmen.

8. The Tribunal by the impugned award has held that the reference was not maintainable against the Company, employer and

employee relationship existed between the Company and the retrenched workmen and the Company had not closed its business. It held that the action of the Company, through its agents, a mere name lender M/s. Ultramarine, in retrenching the twenty four workmen under reference working in transhipper “M.V. Orissa” owned by it w.e.f. 30.6.1999 was illegal and improper, consequently the employer M/s. Sesa Goa was directed to reinstate the workers under reference in service with full back wages and continuity in service.

9. In the petition, the main issue for decision is regarding the correctness of the findings recorded by the Industrial Tribunal holding that the retrenched workmen were the employees of the petitioner Company and respondent No.2 was a mere name lender. This issue is required to be examined by scanning the documentary and oral evidence on record vis a vis the settled legal position in respect of the contract labours engaged under the Contract Labour (Regulation and Abolition) Act, 1970 (for short, “CLRA Act”). It is more than clear that the Union's claim was mainly based on the law laid down in the case of A**IR India Statutory Corporation etc**. **v. United Labour Union, (1997 (9) SCC 377)** and **the Secretary Haryana State Electricity Board vs. Suresh and ors. etc.etc. (AIR 1999 SC 1160).** The view taken in **Secretary Haryana State Electricity Board's case, (supra)** was by following the earlier view taken in the case of A**IR India Statutory Corporation etc (supra).** At the threshold it needs to be noted that the view taken in the case

of A**IR India Statutory Corporation etc. (supra), has been overruled** by the Constitution Bench of the Court in the case of **Steel Authority of India Ltd. And ors. vs. National Union Waterfront Workers and ors. (2001) 7 SCC 1.** The Constitution Bench outlined its discussions, setting out guiding principles in para 125 of its Judgment. Clause 5 of para 125 is not only relevant, but is the crux of the issue involved in this petition for consideration and, therefore, the same is hereby reproduced as under :

> "125(5) On issuance of prohibition notification under Section 10(1) of the CLRA Act prohibiting employment of contract labour or otherwise, in an industrial dispute brought before it by any contract labour in regard to conditions of service, the industrial adjudicator will have to consider the question whether the contractor has been interposed either on the ground of having undertaken on produce any given result for the establishment or for supply of contract labour for wok of the establishment under a genuine contract or is a mere ruse/camouflage to evade compliance with various beneficial legislations so as to deprive the workers of the benefit thereunder. If the contract is found to be not genuine but a mere camouflage, the so-called contract labour will have to be treated as employees of the principal employer who shall be directed to regularise the services of the contract labour in the establishment concerned subject to the conditions as may be specified by it for that purpose in the light of para 6 hereunder."

10. Para 125 (6) of the said Judgment reads thus :

> "(6) If the contract is found to be genuine and prohibition notification under Section 10(1) of the CLRA Act in respect of the establishment concerned has been issued by the appropriate Government, prohibiting employment of contract labour in any process, operation or other work of any

> establishment and where in such process, operation or other work of the establishment the principal employer intends to employ regular workmen, he shall give preference to the erstwhile contract labour, if otherwise found suitable and, if necessary, by relaxing the condition as to maximum age appropriately, taking into consideration the age of the workers at the time of their initial employment by the contractor and also relaxing the condition as to academic qualifications other than technical qualifications."

In the case at hand, the appropriate Government has not issued any notification under Section 10(1) of the CLRA Act prohibiting employment of contract labour in any process or other works of the present petitioner Company and, therefore, the main issue which is required to be examined is regarding the employer and employee relationship between the Company and the workmen concerned. If this issue is answered finally in the affirmative, the action of termination will be required to be examined on the ground of its legality. Admittedly, the respondent Contractor has issued the termination orders when it received the communication from the petitioner Company that its transhipping activities on the Vessel were closed.

11. In the case of **Dharangadhra Chemical Works, Ltd. vs. State of Saurashtra and ors.** (1957 (1) LLJ 477), a four Judge Bench of the Supreme Court, after referring to the earlier decisions in the case of **Collins vs. Hertfordshire County Council** (1947 K.B. 598, 615), **Short vs. J. & W. Henderson Ltd.** (1946 62 T.L.R. 427),

Mercy Docks and Harbour Board vs. Coggins & Griffith (Liverpool) Ltd., (1947) 1 A.C. 1, 23) and S**tevenson, Jordan and Harrison, Ltd. vs. Macdonald and Evans,** (1952) 1 T.L.R. 101, was pleased to set out the following guiding principles to determine the employer and employee relationship.

(a) The test which is uniformly applied in order to determine the relationship is existence of right to control in respect of the manner in which the work is to be done and a distinction is also drawn between a "contract for services" and a "contract of service" ;

(b) the prima facie test for termination of the relationship between master and servant is the existence of the right in the master to supervise and control the work done by the servant not only in the matter of directing what work the servant is to do, but also the manner in which he shall do his work;

(c) the nature or extent of control which is requisite to establish the relationship of employer and employee must necessarily vary from business to business and is by its very nature incapable of precise definition, and

(d) the correct method of approach, therefore, would be to consider whether having regard to the nature of the work there was due control and supervision by the employer.

12. In a subsequent decision in the case of **Hussainbhai vs. The Alath Factory Tezhilali Union and ors.** (AIR 1978 SC 1410), a

three Judge Bench of the Supreme Court reiterated the guidelines on the issue of employer and employee relationship in the following words :

> ”The true test may, with brevity, be indicated once again. Where a worker or group of workers labours to produce goods or services and these goods or services are for the business of another, that other is, in fact, the employer. He has economic control over the workers' subsistence, skill, and continued employment. If he, for any reason, chokes off, the worker is virtually laid off. The presence of intermediate contractors with whom alone the workers have immediate or direct relationship ex contractu is of no consequence when, on lifting the veil or looking at the conspectus of factors governing employment, we discern the naked truth, though draped in different perfect paper arrangement, that the real employer is the Management, not the immediate contractor. Myriad devices, half-hidden in fold after fold of legal form depending on the degree of concealment needed, the type of industry, the local conditions and the like, may be resorted to when labour legislation casts welfare obligation on the real employer based on Arts. 38, 39, 42, 43 and 43-A of the Constitution. The court must be astute to avoid the mischief and achieve the purpose of the law and not be misled by the maya of legal appearances.”

13. The accepted position and duly proved from the evidence led by the respective parties before the Industrial Tribunal reveals that (a) the workmen concerned were appointed by respondent No.2 contractor; (b) maintaining their attendance, issuing pay slips, disbursing monthly salary/wages and Provident Fund, including insurance was done by the contractor; (c) disciplinary actions and other related issues were within the control of the contractor; (d) the company was issued a licence to engage contract labours in Form -VI

on 13.4.1998 by the Assistant Labour Commissioner, Vasco da Gama; (e) there was a settlement signed between respondent No.2 Contractor and respondent No.1 Union on 11/2/1998 regarding the pay structure and other allowances to the 32 workmen engaged on the Vessel of the Company by respondent No.2; (f) out of 32 workmen engaged by respondent No.2 on the Vessel on contract basis, three were supervisors, one was office clerk and remaining were crane operators, fitters and electricians and their pay scales were more than the employees of the Company in the respective posts. The settlement was signed under Section 12(3), read with 18(3) of the Industrial Disputes Act, 1947 and though the Company was not a party to the settlement, by a separate communication it had acknowledged its commitment to pay to the contractor all the financial dues arising out of the liability from the said settlement. The work of the crane operators, fitters and drivers etc., was being supervised by the employees of the Contractor.

14. Now coming to the oral evidence, led by the Union, the first witness Mr. Francsico Rodrigues, General Secretary of the Union stated, inter alia, that :

> "(a) the terms of the contract and other stipulations are eloquent enough to prove that the said contracts are sham, bogus and mere ploy employed by M/s. Sesa Goa Ltd., and the alleged contractor is a mere camouflage and a name lender only;

(b) the workers had been working for M/s. Sesa Goa, on their vessel, all necessities of the workers and wages were provided and paid respectively by M/s. Sesa Goa;

(c) the work of the workmen was supervised by the shift engineer employed by M/s. Sesa Goa Ltd., who also used to give directions as to the manner of the work from time to time;

(d) M/s. Agencia Ultramarine Co. Pvt. Ltd., has no technical staff of its own and therefore, it is required to be held that all these workmen are the workmen of M/s. Sesa Goa Ltd."

In the cross examination, the said witness admitted as under :

"(a) It is correct I as a Secretary of the Union of Mormugao Waterfront Workers' Union signed a settlement on 11.2.99 with Agencia Ultramarine and M/s. Sesa Goa is not a party to the said settlement.

(b) it is not correct that reference raised by the union on re-employment of the workers under reference was rejected by the Government.

(c) It is true in October, 99 when the ship came back, Sesa Goa required some crane operators to operate the cranes on the ship. It is correct that Agencies Ultramarine had requested the workmen

under reference who were crane operators to report to them to give work as crane operators. It is correct workers did not report in pursuance of the letter of Agencies Ultramarine i.e. letter dated 29.10.99 filed with (Exhibit-18/12). It is correct that all workers replied to those letters saying Agencia Ultramarine Co. to discuss with their union.

(d) It is correct this register shows payment was made by Agencia Ultramarine to the workmen under reference and it was received by them.

(e) It is true that Sudhil Manerkar, Director of Agencies Co. had issued show cause notices/warnings to the workmen under reference and those were replied by me as office bearer of the union addressed to said Manerkar.

(f) It is correct, settlement dtd. 11.2.98 was preceded by Charter of Demands dated 6.12.97 addressed to Director, Agencia Ultramarine. I had submitted Charter dated 6.12.97 after the workmen joined our union. In this charter, we did not make demand for abolition of Contract Labour. It is correct that at no time I demanded on behalf of the union on abolition of contract labour on the ship T.V. Orissa. I am aware about the procedure of the Contract Labour Act. It is correct that Sesa Goa had obtained

licence for the period 20th September, 97 onwards under the Contract Labour Act.

(g) I had signed settlement dated 11.2.98 with Agencia Ultramarine and as per the said settlement I had stated that Sesa Goa was the principal employer and Agencia Ultramarine Co. the contractor. It is correct all the time we treated Sesa Goa as the Principal Employer. We had never by any correspondence pointed out to Agencia Ultramarine Co. that workmen under reference are not its employees. It is correct that services of workmen under reference were terminated by Agencia and they were accepted by the workmen.

(h) It is true that there is one Supervisor for each shift. It is correct these three supervisors were employees of Agencia Company and their names were Anil Arandikar, Shaikh Murindin and Georgeine Fernandes. It is correct that Albert was sending the work reports of loading to Agencia Company. It is correct that Agencia Ultramarine is a separate Company or legal entity.

15. Mr. Wilson Dias, the second witness of the Union contradicted his own affidavit which was submitted by way of examination-in-chief, in his elaborate cross examination by the

Company as well as the contractor and he admitted as under :

> "(a) It is correct as I learnt there was work of fitter I met Sudhir Manerkar, Director of Agencia Ultramarine somewhere in March, 96. It is correct earlier this vessel was ocean going vessel. It is correct our wages were equivalent to workers of Port & Dock Workers. It is correct we get more wages than the employees of Sesa Goa. It is correct Sesa Goa was not party to the document of settlement (Ex.-72). It is correct in October, 99 Agencia Ultramarine Co. had called the crane operator for the work as per their requirement. It is correct that we replied by letter dated 3.11.99 saying first to discuss with the union and if all the retrenched workers are taken on work we would be reporting for duty. We were receiving wages from the office of Agencia Ultramarine. Wages register (Exh. 21/9) bears my signature against my name. It is correct other workmen under reference were also collecting their wages from the office of Agencia Ultramarine. I was given gate pass by Agencia Ultramarine. Deductions towards EPF, Income-tax (TDS) was done by Agencia Ultramarine from my wages. It is correct we were making applications for leave and giving to the supervisors of Agencia Ultramarine and supervisors of

said Company used to tell us whether leave was sanctioned or not. It is correct we were getting bonus from Agencia Ultramarine. It is correct there were three supervisors viz. Anil Arondekar, Shaikh Narundim and Fernandes of Agencia Ultramarine. It is correct that we never said earlier that Agencia Ultramarine was not our employer. It is correct a charge sheet dated 21st November, 98 was issued by Agencia Ultramarine Ltd. It was replied by me through union to Agencia Ultramarine. It is correct till the termination we were getting the benefits under the settlement (Exh. 72)."

The third witness Manoj Salgaonkar, examined on behalf of the Union admitted in his cross examination as under ;

" (a) It is correct settlement dated 11.2.98 (Ex. 72) was signed by our union with Agencia Ultramarine. It is correct the EPF contribution was deducted by Agencia Ultramarine from the salary. Our supervisor Anil Arondekar used to mark our attendance. It is correct we were getting wages in the Office of Agencia Ultramarine. We were getting payment by cheque. We were making signatures on the pay register. I do not know whether payment register was of Agencia Ultramarine. Documents now shown to me (Ex. 21/9) page-91, Sr. No.17

shows my name, bears my signature for receiving the payment from establishment Agencia Ultramarine.

(b) We were given entry pass for entering and going out of the port area. Those entry passes were issued by Agencia Ultramarine. Anil Arondekar was working with me as a supervisor. He was working as supervisor on T.V. Orissa. I was making applications before going on leave. We were giving these applications to supervisors, viz. Anil Arondekar, Shaikh Narrudin, Rogina Fernandes. It is correct those three Supervisors were employees of M/s. Agencia Ultramarine. It is correct these three supervisors were marking our attendance. It is correct our income tax was deducted by Agencia Ultramarine. We were getting bonus amount in the office of Agencia Ultramarine. It is correct that one Albert Fernandes was employee of Agencia Ultramarine. It is correct documents (Ex.18/5) was entered into between our Union and the management of Agencia Ultramarine. It is correct that Agencia Ultramarine had given me charge sheet page 7/8 (Exhibit-74). It is correct that Agencia Ultramarine never delayed the payment. It is correct I had received money from Agencia Ultramarine and

it is correct that I was appointed by Agencia Ultramarine. I was paid wages by that company. It is correct that I was given charge sheet by Agencia Ultramarine.

16. Notwithstanding the above said admitted evidence of all the three witnesses of the Union and the evidence of the company and the Contractor, the learned Presiding Officer of the Tribunal did not refer to this evidence which went to the root of the issue regrading employer and employee relationship. The learned Presiding Officer noted that :

(a) for the first time, the registration was sought by M/s. Sesa Goa in 1998 which clearly supported the contention of the Union that the company was prohibited from engaging the alleged contract labour and, therefore, the workers were required to be treated as employees of M/s. Sesa Goa.

(b) when the work exits, mining business is going on and the ship M.V. Orissa is used as transhipper and the workers under reference are in reality the workers of M/s. Sesa Goa and that M/s. Agencia Ultramarine is an agent, a mere ploy, a name lender, if looked the contracts in the light of observations in case of Steel Authority of India Limited coupled with the evidence as a whole, safely go to show that contracts are sham and camouflage, consequently the reference is maintainable. In this context, the action of the employer M/s. Sesa Goa in retrenching the workmen

through M/s. Agencia Ultramarine a name lender is wholly illegal and improper.

(c) Company is silent on the compliance of the requirement in Schedule V-A & V-B of the Industrial Disputes Act. This shows that the business of Sesa Goa is still going on and therefore, hardly it can be said that the business was closed and hence, the question of closure does not arise.

(d) Director of M/s. Agencia Ultramarine was admittedly paid by M/s. Sesa Goa Rs.15,000/- per month from June to September, and Rs.25,000/- from October to May, which indicates that the Director is in reality employee of M/s. Sesa Goa and that he had engaged the workers which inevitably point out the workers under reference were engaged by the employee of M/s. Sesa Goa and consequently they are the workers of Sesa Goa.

17. These findings recorded by the Tribunal are wholly untenable and against the settled position of law. In the case of **Hari Shankar Sharma and ors. vs. Artificial Limbs Manufacturing Corporation and ors.** (2002) 1 SCC 337, the Supreme Court in para 12, stated thus :

> “12. Before the Labour Court the contractor stated in the cross-examination that he used to supervise and control his employees and pay their salaries. Even the witnesses for the appellants stated that their salaries were paid by the contractor. The appellant's witnesses also said that Respondent 2 brought the raw material. Respondent 1's witnesses said that Respondent 1 had no hand in the selection of the employees of the canteen. The

> prescribed procedure for appointing employees of Respondent 1 was not applied to them. Respondent 1 did not record their attendance nor paid them their salaries. The Labour Court also noted that the appellants' witnesses were unable to identify or name any officer of Respondent 1 who they claimed supervised their work. The Labour Court found that the appellants were unable to prove that respondent 1 exercised any control or supervision over the employees of the contractor. After a detailed analysis of the evidence, the Labour Court concluded that the appellants were not the employees of Respondent 1. The finding cannot be term to be perverse."

In the case of **Municipal Corporation of Greater Mumbai vs. K.V. Shramik Sangh and ors.** (2002) 4 SCC 609, the issue regarding the consequences on failure to apply for a licence under the CLRA Act was considered and in para 28, the Supreme Court held that the absorption of contract labourers cannot be automatic and it is not for the court to give such direction. It further noted that the conclusion that the contract was sham or it was only camouflage, cannot be arrived at as a matter of law for non-compliance with the provisions of the CLRA Act. In para (20), the Court observed :

> "…. From the Judgment under challenge, it is clear that Air India case weighed with the High Court, which judgment now stands overruled as already stated above. The High Court rejected the contention that jurisdiction to abolish the contract labour labour system vested with the appropriate government under Section 10 of the CLRA Act and that power could be exercised after obtaining advice of the Contract Labour Advisory Board which in turn had to keep in mind several factors

> enumerated in clauses (a) to (d) of Section 10(2) of the CLRA Act stating that in the present case in almost 15 years, there was no registration of the principal employer; none of the contractors ever held a licence under the Act; the work that was being carried on fell within the parameters of clauses (a) to (d) of Section 10(2) of the Act and having regard to what was said by the Chairman, Standing Committee of the Corporation and the contractors and recommendation of the Labour Commissioner to abolish the contract labour system. Further, the Ministry for Labour of the Government of Maharashtra went on to record in clear terms that the Government had taken a decision to abolish the system of contract labour in the Solid Waste Management Department of the Corporation, the High Court though that there was sufficient material for abolishing the contract labour system. The High Court drew an inference that the State admitted that all the requirements were satisfied for acting under Section 10(2) but because of the election code of conduct it was unable to act and passed order for absorption of workers saying that it had no impediment t do so in view of its conclusions. Referring to Air India case, the High Court observed that the said judgment suggested that a contract labour system can be said to be genuine only if it is carried in compliance with the provisions of the CLRA Act and anything contrary thereto would lead to the presumption that the purported contract labour system was merely a device and a sham. In our view, the conclusion of the High Court that the contract labour system in the present case was a sham, cannot be sustained in the light of what is stated above and particularly when the disputed questions of fact arose for consideration in the light of rival contentions raised by the parties....”

18. The evidence of the witnesses examined by the Union - two of them were the employees of respondent No.2 engaged on the Vessel, clearly went to show that they were appointed by the contractor, their salary/wages and all other menetary benefits,

including bonus were paid by the contractor, their leave and attendance was maintained by the contractor, their duties were being supervised by the supervisors who were engaged by the contractor. Entry gate passes were also issued by the contractor, insurance coverage was taken by the contractor, disciplinary actions were taken by the contractor. The Union or the workmen have never claimed before they were retrenched that they were not the employees of the contractor and that the contract was bogus or sham. It was also admitted that the contractor appointed them after he was engaged as contractor of the Vessel and that when the petitioner Company called upon the contractor to restart the closed activities, all the crane operators were recalled by the contractor by new letter and the crane operators declined to rejoin contending that unless all the 24 workmen were engaged, they would not rejoin. The contractor was an independent legal entity, incorporated under the Companies Act 1956 with Mr. Sudhil Manerkar as its Director. An amount of Rs.15,000/- or Rs.25,000/- per month which was being paid to him by the Company cannot be a reason for the Tribunal to hold that he was an employee of the petitioner Company. It has come in the evidence that the financial liabilities arising from the settlement at Exhibit 72 were being reimbursed to the contractor by the petitioner Company and, in addition, he was being paid this amount monthly. Obviously, and as has been stated by the witness of the petitioner Company as well as the contractor, it was the amount of commission/service charges. By no stretch of imagination this could be termed as salary

being paid to Mr. Sudhil Manerkar, Director of the Contractor. The Tribunal fell in manifest error in recording a conclusion that the retrenched 24 workmen were in fact the employees of the petitioner Company. This finding is not only contrary to the evidence on record, but indeed far-fetched and based on assumptions and surmises. The Tribunal also lost sight of an important issue, namely that the competent Authority had rejected the demand raised by the Union for reinstatement in the petitioner Company and a specific reason was stated in the order dated 1.6.1999. It was noted in the said order rejecting the reference for adjudication that these workmen were employed by the contractor and for a specific period when the Vessel had transhipping activities. The evidence on record clearly proved that the 24 retrenched workmen were employed by the contractor and they were, in fact and in law, the employees of the said contractor Company, namely M/s. Agencia Ultramarine Pvt. Ltd..

19. Once it is held that the findings recorded by the Tribunal are held to be unsustainable, the demand referred to adjudication is required to be examined on merits vis a vis the real employer, i.e. the contractor. This has not been done and, therefore, the reference is required to be remanded for fresh adjudication as against the contractor only. The contractor is an independent legal entity and, therefore, the Tribunal will have to examine whether the retrenchment of the services of the 24 workmen, w.e.f. 30.6.1999 by M/s. Agencia Ultramarine Pvt. Ltd., was legal and justified and if not, what relief

the workmen are entitled to ?

20. In the result, this petition succeeds as the impugned award suffers from errors apparent on the face of the record and the finding recorded by the Tribunal regarding the employer and employee relationship between the petitioner Company and the retrenched workmen, is wholly unsustainable. The impugned Award is, therefore, quashed and set aside and the reference, as made vide Order dated 1.6.2000 by the competent Authority is, hereby, remanded for fresh adjudication against respondent No.2 Contractor alone. Both, the Union as well as respondent No.2 Contractor are at liberty to adduce additional evidence, if so desired. However, the reference on remand shall be decided as expeditiously as possible and in any case within a period of six months from the date of first appearance. The parties concerned, i.e. the Union and the Contractor should appear before the Tribunal on 16th November, 2004 at 11.00 a.m.

Rule is made absolute, accordingly. The R & P be returned along with the writ forthwith.

B.H. MARLAPALLE, J.

ssm.